

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TARA GARLICK; MERRI SILVA; CHRIS SILVA; MINORS MAKEYLA L. SILVA, CHELSEA J. SILVA, CATELYN R. SILVA, AND ELI Z. SILVA, INDIVIDUALLY AS SUCCESSORS IN INTEREST TO DAVID S. SILVA, BY AND THROUGH THEIR GUARDIAN *AD LITEM*, JUDY SILVA; AND, MINOR JADE SILVA, INDIVIDUALLY AS SUCCESSOR IN INTEREST TO DAVID S. SILVA, DECEASED, BY AND THROUGH HER GUARDIAN *AD LITEM* ADRIANE DOMINGUEZ,

Plaintiffs,

v.

COUNTY OF KERN, IN ITS OFFICIAL CAPACITY; SERGEANT DOUGLAS SWORD, DEPUTIES JEFFREY KELLY, LUIS ALMANZA, RYAN BROCK, DAVID STEPHENS, TANNER MILLER, RYAN GREER, AND CHP OFFICERS MICHAEL PHILLIPS AND MICHAEL BRIGHT, EACH IN THEIR INDIVIDUAL CAPACITIES,

Defendants.

Case No. 1:13-CV-01051-LJO-JLT

ORDER ON THE PARTIES' MOTIONS IN LIMINE.

(Docs. 168-185)

Plaintiffs Tara Garlick, Merri Silva, Chris Silva, and minors Makeyla L. Silva, Chelsea J. Silva, Catelyn R. Silva, and Jade Silva (collectively, "Plaintiffs") bring the instant civil rights action against Defendants County of Kern, Sergeant Douglas Sword, Deputies Jeffrey Kelly, Luis Almanza, Ryan Brock, David Stephens, Tanner Miller, Ryan Greer, and California Highway Patrol ("CHP") Officers Michael Phillips and Michael Bright (collectively, "Defendants"), alleging excessive force under 42 U.S.C. § 1983 ("Section 1983"). The case arises from the in-custody death of David S. Silva ("Silva" or "the Decedent") in the course of an encounter with County of Kern Sheriff's Deputies

1 and California Highway Patrol (“CHP”) Officers on May 7, 2013. Plaintiffs claim that the officers’
 2 use of force violated Decedent’s Fourth and Plaintiffs’ Fourteenth Amendment rights. Defendants
 3 counter that their use of force was reasonable. The facts are otherwise known to the parties and
 4 need not be repeated here. *See* Doc. 157, Order on Defendants’ Motions for Summary Judgment;
 5 *see also* Doc. 161, Pretrial Order. Pending before the Court are the parties’ motions *in limine* (Docs.
 6 168-185), which the Court deem appropriate for resolution without oral argument. *See* E.D. Cal.
 7 Civ. L.R. 230(g). For the reasons explained below, the Court decides the motions as follows.

8 **LEGAL STANDARD**

9 A party may use a motion *in limine* as a procedural mechanism to exclude inadmissible or
 10 prejudicial testimony or evidence in a particular area before it is introduced at trial. *See Luce v.*
 11 *United States*, 469 U.S. 38, 40 n. 2 (1984); *see also United States v. Heller*, 551 F.3d 1108, 1111
 12 (9th Cir. 2009). Such motions allow parties to resolve evidentiary disputes before trial and avoid
 13 potentially prejudicial evidence being presented in front of the jury, thereby relieving the trial judge
 14 from the formidable task of neutralizing the taint of prejudicial evidence. *Brodit v. Cambra*, 350
 15 F.3d 985, 1004-05 (9th Cir. 2003). Pretrial motions such as motions *in limine* “are useful tools to
 16 resolve issues which would otherwise clutter up the trial.” *Palmerin v. City of Riverside*, 794 F.2d
 17 1409, 1413 (9th Cir. 1986); *see also Jonasson v. Lutheran Child and Family Services*, 115 F.3d
 18 436,440 (7th Cir. 1997) (“[A] motion in limine is an important tool available to the trial judge to
 19 ensure the expeditious and evenhanded management of the trial proceedings.”).

20 Motions *in limine* that exclude broad categories of evidence are disfavored, and such issues
 21 are better dealt with during trial as the admissibility of evidence arises. *See, e.g., Brown v.*
 22 *Kavanaugh*, No. 1:08-CV-01764-LJO, 2013 WL 1124301, at *2 (E.D. Cal. Mar. 18, 2013) (citing
 23 *Sperberg v. Goodyear Tire & Rubber, Co.*, 519 F.2d 708, 712 (6th Cir. 1975); *see also In re*
 24 *Homestore.com, Inc.*, No. CV 01-11115 RSWL CWX, 2011 WL 291176, at *2 (C.D. Cal. Jan. 25,
 25 2011) (holding that motions *in limine* should “rarely seek to exclude broad categories of evidence,
 26 as the court is almost always better situated to rule on evidentiary issues in their factual context
 27 during trial”); *Cf. Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2012 WL 1189898, at *4
 28 (N.D. Cal. Jan. 4, 2012) (concluding that “a broad categorical exclusion” was unwarranted).

1 Additionally, some evidentiary issues are not accurately and efficiently evaluated by the
 2 trial judge in a motion *in limine*, and it is within the district court's discretion to defer ruling until
 3 trial when the trial judge can better estimate the impact of the evidence on the jury. *See, e.g., United*
 4 *States v. Amaro*, 613 F. App'x 600, 602 (9th Cir.), *cert. denied sub nom. Stewart-Hanson v. United*
 5 *States*, 136 S. Ct. 276 (2015); *see also Jonasson*, 115 F.3d at 440.

6 DISCUSSION

7 I. PLAINTIFFS' MOTIONS IN LIMINE

8 Plaintiffs bring six motions *in limine* ("MIL"), which the Court addresses in turn.

9 1. to Exclude Facts Not Known to the Individual Defendants at the Time of the Incident 10 (Doc. 180, Plaintiffs' MIL No. 1).

11 Plaintiff seeks to exclude any and all evidence regarding information not known to the
 12 Defendant officers at the time of the incident. Specifically, Plaintiffs seek to exclude evidence
 13 related to: any prior drug use by Silva; any prior drug use by any other member of Silva's family,
 14 including Tara Garlick ("Garlick"); any reference to drugs; any reference to a post-mortem
 15 toxicology test; and, any reference to argument or fights between Silva and Garlick. Plaintiffs argue
 16 such information is irrelevant because Defendants were unaware of them at the time they used force
 17 against Silva. *See Fed. R. Evid. 401*). Plaintiffs also contend that any argument that Silva was
 18 engaged in any specific conduct based solely on his prior behavior would involve an improper
 19 inference based on his character. *See Fed. R. Evid. 404(a)(1)*. Third, Plaintiffs argue that any
 20 reference to this information would be "dangerously" prejudicial at trial and would necessitate
 21 mini-trials about prior incidents which are irrelevant to the central question of whether the officers'
 22 conduct was objectively reasonable. *See Fed. R. Evid. 403*.

23 The Court **DENIES IN PART** and **GRANTS IN PART** Plaintiffs' motion, as follows. As
 24 to Silva's drug use, the Court **DENIES** the motion in substance, conditioned on a representation
 25 from Defendants' counsel that there exist timely designated experts to explain the physical cause
 26 and effect of the drug and alcohol use in regards to demeanor, cause of death, longevity, and quality
 27 of life. Absent such representation by counsel, the motion is **GRANTED**. Under no circumstances
 28 may any potential testimony be used as character or propensity evidence, and to that extent the

1 Court **GRANTS** the motion. Upon review of the Rule¹ 403 issues, the Court concludes that
2 preclusion on this ground is not appropriate. As to evidence of domestic disputes between Silva and
3 Garlick, such evidence may be used, if appropriate and established, for impeachment purposes and
4 may also be used on the issue of damages, and in that way the Court **DENIES** the motion.

5 **2. to Exclude Garlick's Prior Drug History (Doc. 181, Plaintiffs' MIL No. 2)**

6 Plaintiff seeks to exclude any and all evidence regarding Garlick's drug history, including
7 that she temporarily lost custody of her children subsequent to Silva's death due to her drug history
8 arguing that it is irrelevant, impermissible character evidence, and is more prejudicial than
9 probative. *See* Fed. R. Evid. 401, 403, 404.

10 The Court concludes that any and all evidence about Garlick's drug history is precluded as
11 impermissible character evidence. However, as it relates to damages, the Rule 403 analysis weighs
12 in favor of admission rather than preclusion. For that reason, the Court **DENIES** the motion
13 **WITHOUT PREJUDICE**. This is not to say that such evidence will be admitted. Rather, this
14 ruling simply means the matter will not be precluded pre-trial. In sum, the foundation for such
15 expert opinions on this topic must first be established before any such opinions are solicited and/or
16 expressed.

17 **3. to Exclude Facts that One of Garlick's Neighbors Molested Silva's Two Youngest**
18 **Children Subsequent to His Death (Doc. 182, Plaintiffs' MIL No. 3).**

19 Plaintiffs seek to exclude any and all evidence related to the alleged molestation, subsequent
20 to Silva's death, of Silva's two youngest daughters on grounds that the allegation is irrelevant,
21 constitutes hearsay, lacks foundation, and is more prejudicial than probative. *See* Fed. R. Evid. 401,
22 802, 602, 403.

23 The Court finds that evidence related to the alleged molestation by one of Garlick's
24 neighbors of Silva's two youngest daughters is probative for two reasons. First, it goes to witness
25 Dr. Kaser-Boyd's credibility. Second, it is relevant to the calculation of Plaintiffs' damages where
26 two minor Plaintiffs may have suffered emotional harm separate from the loss of their father. The
27 probative value outweighs any risk of prejudice, jury confusion, or undue consumption of time. If

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¹ Hereinafter, references to the "Rules" or "Rule" indicate the Federal Rules of Evidence.

1 counsel offers admissible evidence that the alleged event(s) actually happened AND expert
 2 evidence that it is probable that it caused emotional trauma that is being blamed for the death, then
 3 it is relevant. The motion is **DENIED WITHOUT PREJUDICE**.

4 **4. to Exclude Opinions and Testimony of Harold L. Seymour, Ph.D. (Doc. 183, Plaintiffs’**
 5 **MIL No. 4).**

6 Plaintiffs make a *Daubert* motion to exclude the expert testimony and opinions of Harold L.
 7 Seymour, Ph.D. on the basis that he never interviewed the Silva children or members of the Silva
 8 family, and never conducted any psychological testing of the children. Moreover, Plaintiffs contend
 9 that Dr. Seymour has never testified with respect to psychological trauma in a case involving a
 10 minor child where he had not interviewed the child. Plaintiffs argue that Dr. Seymour’s opinions
 11 lack foundation and should be excluded under the rule in *Daubert v. Merrell Dow Pharmaceuticals,*
 12 *Inc.*, 509 U.S. 579, 591-92 (1993) and Rule 702, or in the alternative, Rule 403.

13 The Court finds that Plaintiffs’ arguments go to weight, not admissibility. The Court finds
 14 that, as Defendants contend (*see* Doc. 203), Dr. Seymour’s review of Dr. Kaser-Boyd’s report,
 15 interview notes, and test results may provide sufficient foundation, consistent with the requirements
 16 under Rule 702 and *Daubert*, 509 U.S. at 591-92, to allow Dr. Seymour to opine as to Dr. Kaser-
 17 Boyd’s methodology and to rebut her opinions. However, the proper foundation must be laid for
 18 such testimony to be admissible. The motion is **DENIED WITHOUT PREJUDICE**.

19 **5. to Exclude Defense Expert Steven Karch, M.D., Theodore Chan, M.D., and Frank**
 20 **Sheridan M.D. from Testifying (Doc. 185, MIL No. 5).**

21 Plaintiffs argue that Defendants have retained three expert witnesses who will testify that
 22 “during the encounter with the individual defendants (in which Silva was struck with batons, bitten
 23 by a dog, restrained, hogtied, and compressed for as long as 10 minutes with multiple defendants’
 24 weight on his back) he spontaneously died of unrelated or natural causes.” Doc. 185 at 3:6-10.
 25 Plaintiff contends that these opinions are “junky.” *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S.
 26 137, 159 (1999) (Scalia, J., concurring). About these experts—Dr. Theodore Chan, Dr. Frank
 27 Sheridan, and Dr. Steven Karch—Plaintiffs contend that, under *Daubert*, testimony should be
 28 precluded. First, Plaintiffs contend that Dr. Chan’s studies were funded by the City of San Diego in

1 preparation for litigation and are unreliable under 702 and *Daubert* principles. *See Daubert*, 509
2 U.S. at 594-95. Plaintiffs posit that reliability is determined by assessing “whether the reasoning or
3 methodology underlying the testimony is scientifically valid,” whereas relevance depends upon
4 “whether [that] reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592–
5 593. Plaintiffs argue that Dr. Chan’s opinions should be excluded because he has not “reliably
6 applied the principles and methods to the facts of the case.” Rule 702. Moreover, Plaintiffs aver that
7 the three experts opine that it is not possible to diagnose compressional asphyxia without petechial
8 hemorrhages, but no medical literature suggests that these two phenomena are perfectly correlated.
9 In other words, Drs. Chan, Sheridan, and Karch’s opinions that it is impossible for one to happen
10 without the other are incorrect and should be excluded under *Daubert*. In sum, Plaintiffs argue that
11 because “there is no scientific, forensic, medical, or other evidence that Silva died from any cause
12 other than his encounter with law enforcement,” the three expert opinions are offered “to confuse
13 and mislead the jury,” and should be excluded under either 702 or *Daubert*. Doc. 185 at 11:23-26.

14 To the extent that Plaintiffs seek to preclude Drs. Chan, Sheridan, and Karch from
15 testifying, the motion is **DENIED**. The Court finds that the three defense witnesses offered are
16 designated experts with seemingly appropriate credentials. Plaintiffs’ arguments in favor of total
17 preclusion of the doctors’ testimony go to factual disagreement, bias, and weight, but not their
18 actual qualifications or an absence of the basis for opinions. However, there appears to be a
19 *Daubert* issue regarding testimony that petechial hemorrhage is perfectly correlated to asphyxiation
20 where no expert pointed to foundation to support the proposition. The motion in this limited way is
21 **DENIED WITHOUT PREJUDICE**. The Court does not preclude such testimony at this stage, but
22 reminds counsel that the foundation for such expert opinions on this topic must first be established
23 before any such opinions are solicited and/or expressed. *See, e.g., Sanderson v. Int’l Flavors &*
24 *Fragrances, Inc.*, 950 F. Supp. 981, 993-94 (C.D. Cal. 1996) (“the party presenting the expert must
25 show that the expert’s findings are based on sound science, and this will require some objective,
26 independent validation of the expert’s methodology”) (citing *Daubert*). Finally, Plaintiffs argue
27 specifically about Dr. Karch that he has neither reviewed the Decedent’s medical records, nor any
28 of the statements or depositions of the involved officers, thus his testimony should be precluded.

1 Plaintiffs' argument turns on admissibility, not preclusion. That the Court has denied the motion
 2 does not relieve Defendants from establishing background, qualifications, and/or foundational basis
 3 for each opinion offered.

4 **6. to Exclude Cumulative Defense Experts (Doc. 184, Plaintiffs' MIL No. 6).**

5 Plaintiffs argue that Defendants have retained three expert witnesses who will testify about
 6 police practices: Curtis Jefferey Cope (police practices), David Reaver (police practices and dogs),
 7 and Clarence Chapman (police practices); and four medical experts offering the same or similar
 8 testimony about the medical issue of cause of death: Steven B. Karch (medical – cause of death),
 9 Theodore Chan (medical – cause of death), Frank P. Sheridan (medical – cause of death), and
 10 Eugene Carpenter (medical examiner – cause of death). Plaintiffs contend that these various
 11 duplicative experts are a “needless presentation of cumulative evidence.” Therefore, Defendants
 12 should be limited to one police practices expert, one medical expert regarding the Decedent's cause
 13 of death, and one expert on the psychological harm suffered by Plaintiffs. *See* Fed. R. Evid. 403.

14 The Court finds that while there is clear crossover of the police practices experts on content
 15 (e.g., force), each expert is limited to opinions on the conduct of different officers (e.g., deputies or
 16 CHP), and one expert relates only to the actions of a police dog. As to the police practices experts,
 17 the Court **DENIES** the motion. Defendants retained four medical experts, including Dr. Karch,
 18 M.D., FFLM, FFSoc. and with a background in cardiac pathology, to review microscopic slides of
 19 various tissues taken during Silva's autopsy and to focus on reviewing the pathological condition of
 20 Silva's heart. In contrast, Defendants retained Dr. Chan, M.D., for his background in forensic
 21 pathology and experience studying respiratory functions related to positional or restraint asphyxia.
 22 Defendants retained Dr. Sheridan, M.D., to conduct an independent review of Silva's cause of
 23 death by reviewing the autopsy report and other investigative reports, whereas Dr. Carpenter is the
 24 original medical examiner. While the four medical experts have overlapping opinions concerning
 25 the cause of death, each has a different background from the others and arrives at conclusions from
 26 the formation of different processes. As to the medical experts, the Court **DENIES** the motion.

27 **II. DEFENDANTS' MOTIONS IN LIMINE**

28 Defendants bring 23 motions *in limine*, which the Court addresses in turn.

1 **1. to Preclude Evidence of Indemnification of Any or All of the Individually Named**
2 **Defendants by Their Employers and Vicarious Liability of County of Kern (Doc. 179,**
3 **Defendants' MIL No. 1).**

4 Defendants seek to preclude Plaintiffs, their counsel and through them any witnesses from
5 soliciting testimony, or presenting evidence, regarding the individual defendants Sergeant Douglas
6 Sword and Deputies Jeffrey Kelly, Luis Almanza, Ryan Brock, David Stephens, Tanner Miller, and
7 Ryan Greer's indemnification for damages by Defendant County of Kern and CHP Officers
8 Michael Phillips and Michael Bright's indemnification for damages by the State of California.
9 Defendants argue that introduction of any such evidence would be more prejudicial than probative.
10 *See Fed. R. Evid. 403.*

11 The Court **GRANTS** the motion. That said, if a judgment is rendered and the Plaintiffs wish
12 a cautionary instruction that the jury may not consider who does or does not pay, Plaintiffs should
13 submit such instruction with neutral language after meeting and conferring with defense counsel. In
14 sum, if there is a judgment rendered, it is not an issue for the jury who does or does not satisfy it.

15 **2. to Preclude Use of Non-Authenticated and Non-Certified Transcripts of the Audio**
16 **Statements Taken from Percipient Witnesses as part of the County of Kern Sheriff's**
17 **Office Incident/Investigation Report, Case No. SR13-12817 (Doc. 179, Defendants'**
18 **MIL No. 2).**

19 Defendants seek to preclude any and all testimony or evidence regarding the non-
20 authenticated and non-certified transcripts of audio interviews conducted during Kern County
21 Sheriff's Department's in-custody death investigation of the subject incident. Apart from each such
22 transcript being prepared from an audio recording without the certification of a certified court
23 reporter to verify the accuracy of the transcripts, there is also no indication of who prepared each of
24 the transcripts or when they were prepared, making it nearly impossible to lay the appropriate
25 foundation. *See Fed. R. Evid. 901.* Furthermore, such transcripts constitute hearsay and often
26 contain multiple layers of hearsay.

27 The Court concludes that if the transcripts cannot be agreed upon as to accuracy, the
28 videotapes themselves will be played. If that occurs, it is the obligation of the parties to be ready
29 with the exact segments a party wishes to play. The Court will not waste time in front of the jury.

1 This is pretrial preparation. For preparation purposes, the parties are required to give the opposing
2 parties notice of the segments selected for use trial. In this way, the Court **DENIES** the motion.

3 **3. to Preclude Any Analogies, Comparison, or References to Hitler, Nazis, World War II**
4 **Bunker Complexes, etc., in Relation to “Adlerhorst International, Inc.” or Defense**
5 **Expert David Reaver (Doc. 179, Defendants’ MIL No. 3).**

6 Defendants seek to preclude any and all testimony or evidence involving any analogies,
7 comparisons, or references to Hitler, Nazis, World War II bunker complexes, in relation to
8 “Adlerhorst International, Inc.” or defense expert David Reaver on the grounds that it is irrelevant
9 to Mr. Reaver’s qualifications as an expert or whether or not the actions of the individual
10 defendants were reasonable under the totality of the circumstances, and are also inaccurate. *See*
11 Fed. R. Evid. 401, 402, 403, 702, 703.

12 The issue is remote, at best, and balancing probative versus consumption of time, the time
13 concern prevails. The Court **GRANTS** the motion under Rule 403.

14 **4. to Preclude Evidence, Testimony, or Argument Concerning Any Lawsuits which**
15 **Defense Expert David Reaver and/or His Business Adlerhorst International, Inc. Were**
16 **and/or Are Named as Defendants (Doc. 179, Defendants’ MIL No. 4).**

17 Defendants seek to preclude any and all evidence or testimony concerning any lawsuits
18 which defense expert David Reaver and/or his business Adlerhorst International, Inc. were and/or
19 are named as defendants, or inferring that Mr. Reaver is currently or in the past has been a party to
20 any lawsuit, on the grounds that it is irrelevant, constitutes improper character evidence, and is
21 more prejudicial than probative. *See* Fed. R. Evid. Rules 401, 402, 403, 404(b).

22 The Court finds that potential bias questions are appropriate. For example, those related to:
23 any business affiliation Mr. Reaver has with a party to this litigation; that he has testified hundreds
24 of times in police dog cases and never conceded a bad bite; or, that he receives compensation for
25 his work as an expert (including what percentage of his income that produces). However, the filing
26 of other lawsuits, no matter how many, is irrelevant. Eliciting evidence about the results of these
27 lawsuits, from either side of this litigation, is a time issue and is precluded under Rule 403. In these
28 ways, the Court **GRANTS IN PART** and **DENIES IN PART** the motion.

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1 **5. to Preclude Evidence, Testimony, or Argument Concerning Dogs Being Used for**
2 **Purposes of Torture or Inferring that the Involved K-9 Was Used to Torture Silva**
3 **(Doc. 179, Defendants’ MIL No. 5).**

4 Defendants seek to preclude any and all evidence and testimony concerning dogs being used
5 for purposes of torture or inferring that officers used the involved K-9 to torture Silva on the
6 grounds that it is irrelevant and more prejudicial than probative. *See* Fed. R. Evid. 401-403.

7 To the extent of the testimony as set forth in Plaintiffs’ objections (Doc. 206 at 14:7-11), the
8 Court **GRANTS** the motion.

9 **6. to Preclude Plaintiffs’ Retained Expert Ron O’Halloran, M.D., from Offering**
10 **Opinions or Testimony Regarding Restraint Asphyxia and Silva’s Cause of Death**
11 **(Doc. 179, Defendants’ MIL No. 6).**

12 Defendants seek to preclude Plaintiffs’ retained expert Ronald Louis O’Halloran, M.D.,
13 from offering expert opinions or testimony concerning any alleged restraint asphyxia, that any
14 particular deputy or officer’s restraint of Silva caused his death, or that any deputy or officer’s
15 failure to recognize earlier and address promptly Silva’s respiratory distress or subsequent loss of
16 consciousness was a cause of death, under Rule 702 and/or the principles in *Daubert v. Merrell*
17 *Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

18 This argument is spurious. The testimony sought to be excluded is in the realm of factual
19 dispute and is well within the province of a decision by the trier of fact. The Court **DENIES** the
20 motion.

21 **7. to Exclude Inflammatory Evidence (Doc. 168, Defendants’ MIL No. 7).**

22 Defendants seek to exclude items of “inflammatory” evidence, testimony, or argument,
23 specifically: testimony, reference, or argument that any Defendant officers “murdered” Silva; and,
24 testimony, reference, or argument that Silva was “beaten to death” or suffered a “beating death” by
25 police. Defendants argue that these terms call for improper legal and/or medical conclusions of lay
26 witnesses and are more prejudicial than probative value. *See* Fed. R. Evid. 103, 401, 403, 701.

27 The Court **GRANTS IN PART** and **DENIES IN PART**. The target phrases may not be
28 used by any non-expert, unless it is to describe an individual’s feelings as those feelings relate to
29 the issue of damages. The target phrases may be used in opening statement to describe feelings
30 leading to damages and may be used in closing arguments.

1 **8. to Exclude Witness Opinions that Decedent’s Father Died of a “Broken Heart” (Doc.**
2 **169, Defendants’ MIL No. 8).**

3 Defendants seek to exclude any and all testimony or evidence that Silva’s father, Salvatore
4 Silva, died of a “broken heart” on the grounds that it lacks foundation, calls for improper legal
5 conclusions of lay witnesses, are irrelevant to any matter at issue, and is more prejudicial than
6 probative. *See* Fed. R. Evid. 103, 401, 403, 701, 702. Plaintiffs did not file an opposition.

7 The Court finds that such testimony constitutes inadmissible lay opinions and for that
8 reason **GRANTS** the unopposed motion.

9 **9. to Exclude Lay Witness Opinions from Viewing Video Excerpts of the Subject Incident**
10 **Where Such Witnesses Were Not Present at the Scene During the Incident (Doc. 170,**
11 **Defendants’ MIL No. 9).**

12 Defendants seek to exclude opinions or observations by lay witnesses who viewed video
13 excerpts of the subject incident but who were not physically present at the scene to witness it, on
14 the grounds that such testimony lacks foundation, invades the province of the jury, is irrelevant, and
15 is more prejudicial than probative. *See* Fed. R. Evid. 103, 403, 701.

16 The motion does not extend to expert witnesses. The Court acknowledges that there are
17 issues in this case about whether video footage exists, the alleged seizure and/or destruction of it.
18 Defendant the County of Kern, which allegedly seized the footage, wishes to preclude testimony of
19 witnesses who saw the content of the video footage before the alleged seizure. Unless the videos
20 are at the trial and there is no contention about alteration, the witnesses may say what they saw on
21 the videos—without conclusory language. In this limited way, the Court **DENIES** the motion.
22 However, there is an enormous evidentiary difference between saying the officer’s right fist struck
23 the person’s facial area ten times, versus saying the officer was beating the person. The former is
24 fine, but the latter is precluded. In this way, the Court **GRANTS** the motion.

25 **10. to Exclude Gruesome, Gory, and Bloody Photographs of Decedent (Doc. 171,**
26 **Defendants’ MIL No. 10).**

27 Defendants seek to exclude all gruesome, gory and bloody photographs, including autopsy
28 photographs and gruesome photographs of the subject scene on the grounds that the items are
irrelevant and are more prejudicial than probative. *See* Fed. R. Evid. 103, 401, 403.

The photos are relevant. But that is not the primary objection. Rather, the primary objection is under Rule 403. The overly broad description of the photos makes it impossible for the Court to rule. Until such time as Plaintiffs actually seek to introduce such evidence to the jury, the Court **DEFERS** ruling on the motion.

11. to Exclude Other Civil Lawsuits, Citizen Complaints, and/or Settlements or Verdicts Involving Any of the Defendants (Doc. 172, Defendants' MIL No. 11).

Defendants seek to exclude the following evidence, including whether: (1) one or more of the individual Defendants may have been named as a defendant in a previous civil lawsuit, or the facts underlying any other such lawsuit; (2) one or more of the individual Defendants may have been the subject of a citizen complaint and/or tort claim concerning the use of excessive force or failure to provide medical attention; (3) any other use of force incidents involving one or more of the individual Defendants; as well as, (4) the total number of excessive force lawsuits involving the Kern County Sheriff's Department; and, (5) verdicts awarded or settlements reached in police misconduct cases against the Kern County Sheriff's Department or any other law enforcement agency; on the grounds that such evidence is irrelevant, lacks probative value, is more prejudicial than probative, and constitutes inadmissible character evidence. *See* Fed. R. Evid. 401, 403, 404.

Plaintiffs oppose the motion only on the limited grounds that Defendants may open the door to such testimony or evidence at trial. *See* Doc. 210 at 3:1-3.

The Court therefore conditionally **GRANTS** the motion, as follows: such evidence is excluded, unless Defendants broach these subjects in the course of trial. In that event, the issue is subject to a motion outside the presence of the jury, for impeachment purposes only.

12. to Exclude Evidence of Past Bad Acts of Any Individual Defendant and/or Any Other Lawsuits Against the County of Kern, or Any Law Enforcement Witness (Doc. 173,² Defendants' MIL No. 12).

Defendants County of Kern, Deputies Ryan Brock, David Stephens, tanner Miller, and Ryan Greer, similarly seek to exclude evidence regarding prior bad acts or involvement with prior in-custody deaths, specifically related to *Lucero v. Kern County et al.*, on the grounds that such

² Counsel is again directed to use the Court's preferred font (Times New Roman, 12 point), and follow the other pleading paper instructions found at <http://www.caed.uscourts.gov/caednew/assets/File/Pleading%20paper%20instructions.pdf> (last visited April 13, 2016). *See* MIL Nos. 12-16 (Docs. 173-177).

evidence is irrelevant, lacks probative value, is more prejudicial than probative, and constitutes inadmissible character evidence. *See* Fed. R. Evid. 401, 403, 404.

As explained in regards to motion *in limine* No. 11, *supra*, and for the same reasons, the Court **GRANTS** the motion, subject to a motion for impeachment purposes only, outside the presence of the jury.

13. to Exclude Evidence that is Protected by California Penal Code §§ 832.7 and 832.8 and California Evidence Code §§ 1040 and 1043, and the Officers' Right to Privacy (Doc. 174, Defendants' MIL No. 13).

The individual Defendants seek to exclude any questioning and/or testimony regarding their personnel matters, prior complaints concerning job performance, or prior disciplinary issues on the grounds that such evidence is statutorily protected under state law, and is irrelevant, more prejudicial than probative, and constitutes inadmissible character evidence. *See* Fed. R. Evid. 401, 403, 404.

As explained in regards to motion in limine Nos. 11 and 12, *supra*, and for the same reasons, the Court **GRANTS** the motion, subject to a motion outside the presence of the jury for impeachment purposes only.

14. to Exclude Testimony Regarding Opinions as to What David Silva Was Feeling During the Incident (Doc. 175, Defendants' MIL No. 14).

Defendants seek to exclude opinion testimony from percipient witnesses as to what Silva was feeling during the subject incident on the grounds that it is speculation and improper lay witness opinion. *See* Fed. R. Evid. 701.

The words and/or sounds heard or overheard are admissible. So too are the observations seen by witnesses. However, because interpreting them is the work of the jury and not the witness, to that extent, the Court **GRANTS** the motion.

15. to Preclude Plaintiffs and Other Non-Percipient Witnesses from Providing Speculative Testimony Regarding What Happened to David Silva during the Incident (Doc. 176, Defendants' MIL No. 15).

The Court finds the motion unnecessary. All officers of the Court have an obligation not to request answers calling for speculation and to tell witnesses only to be responsive.

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16. to Preclude Testimony or Arguments Regarding the Alleged Deletion of Videos from Witness Maria Melendez’s Cell Phone (Doc. 177, Defendants’ MIL No. 16).

The Court in a minute order has requested additional briefing on this issue. Defendants are directed to respond to the Court’s inquiry (*see* Doc. 218) on or before Friday, April 15, 2016 at 3pm, to which Plaintiffs shall file their response on or before Monday, April 18, 2016 at 3pm.

17. to Exclude Evidence or Witnesses Not Previously Disclosed to Defendants during Discovery (Doc. 178, Defendants’ MIL No. 17).

Pursuant to Federal Rule of Civil Procedure Rule 26(a) or (e), unless used for impeachment, Defendants seek to exclude all evidence or witnesses not previously disclosed to them during discovery, including: Item 53, “funeral pictures” (Doc. 158 at 42:6); Item 129 “Christopher Silva’s birth certificate” (*id.* at 44:26); and, witness “David Delgado” (*id.* at 30:19).

The Court cautions the parties that trial is not to be a continued part of discovery. Rule 26 has its requirements, and noncompliance is not forgiven unless the opposing side shows harm or prejudice. The Court **GRANTS** the motion, and the undisclosed funeral photos as well as the undisclosed witness, David Delgado, are excluded. However, the birth certificate, a legal document that cannot be changed and which has limited relevant information—none of which is surprising to Defendants—will be allowed. To that limited extent, the Court **DENIES** the motion.

18. to Preclude Plaintiffs’ Retained Experts from Testifying at Trial as to Ultimate Facts, the Credibility of Witnesses, Legal Conclusions, Past Experiences, or Claims of Success (Doc. 178, Defendants’ MIL No. 18).

To the extent that the issue is properly outlined in Plaintiffs’ opposition that their expert is “simply stating that the officers’ actions, based on his training and experience, appear to be objectively unnecessary and unreasonable, as those words are used in common parlance,” Doc. 197 at 3, and he does not offer an improper legal conclusion that Defendant officers violated Silva’s Fourth Amendment rights, the Court **DENIES** the motion. Otherwise, as to the broader context of the motion pursuant to Rules 702 and 704 about which Plaintiffs apparently do not object, the Court **GRANTS** the motion.

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1 **19. to Exclude All Video Recordings of the Incident Made by Francisco Arrieta (Doc. 178,**
2 **Defendants' MIL No. 19).**

3 Defendants seek to exclude all video recordings of the subject incident made by Francisco
4 Arrieta due to the spoken commentary contemporaneously recorded, on the grounds that it is
5 irrelevant, more prejudicial than probative, improper lay opinion, and hearsay. *See* Fed. R. Evid.
6 401, 403, 701, 703, 802.

7 The video recording may be shown if the proper foundation is laid. To that extent, the Court
8 **DEFERS** ruling on the motion until such time as Defendant actually seeks to introduce such
9 evidence to the jury. Francisco Arrieta, the photographer/witness, may be asked questions about
10 what he saw or heard, and he may use the audio to refresh his recollection (outside the jury's
11 presence). He may use the transcript to refresh his recollection, assuming one has been prepared
12 and agreed upon by the parties. Other than that, only appropriate questions that would be allowed
13 are to be asked and answered by the witness. The commentary and speculation contained in the
14 audio is not possible to parse without violating the time consumption issue found in Rule 403.

15 **20. to Preclude Plaintiff Jade Silva from Introducing Any Evidence Required to Be**
16 **Disclosed as Part of Her Initial Disclosures or Pretrial Disclosures, and from**
17 **Introducing Any Expert Testimony Due to Her Failure to Serve Any Required**
18 **Disclosures (Doc. 178, Defendants' MIL No. 20).**

19 Pursuant to Federal Rule of Civil Procedure Rule 26(a), Defendants seek to exclude Plaintiff
20 Jade Silva's undisclosed evidence or witnesses, specifically, 26 pictures of the Decedent and Jade
21 Silva; a copy of a birthday card from Decedent to Jade Silva, dated 2003; three pictures of Jade
22 Silva; and one picture of a "Justice for David Silva" prayer box.

23 The Court **GRANTS** the motion to the extent that Plaintiff Jade Silva may not testify to
24 anything not previously provided to the defense under oath (either by Jade Silva's declaration, her
25 deposition, or her answers to interrogatories). It appears that the case has been defended all along
26 with the understanding that Jade Silva was, and is, a Plaintiff. Therefore, in all other respects, the
27 Court **DENIES** the motion.

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21. to Preclude Plaintiffs and their Expert Witnesses from Using, Introducing, or Referring to Training Materials or Bulletins by the Los Angeles Police Department (“LAPD”) or Any Other Non-Involved Law Enforcement Agency (Doc. 178, Defendants’ MIL No. 21).

These materials shall be excluded, unless there is expert testimony and a basis to say that the LAPD training materials or bulletins establish the standard of care, and therefore that the materials were directly or indirectly known by the individual Defendants, or that the Defendants were exposed, in some manner, to the materials. To that extent, the Court **GRANTS** the motion.

22. to Preclude the Use of the CHP MVARs Recording of the Subject Incident (Doc. 178, Defendants’ MIL No. 22).

Defendants Phillips and Bright anticipate displaying at trial an audio/visual recording of the subject incident as captured by the Mobile Visual Audio Recording System (MVARs) installed in their CHP patrol vehicle and request that the terms of the Protective Order (Doc. 96 at 7-8) govern the display and distribution of the recording at trial.

There is no absolute privilege in existence simply because of a “confidential” designation in a discovery protective order or elsewhere. Accordingly, the Court **DENIES** the motion. Of course, counsel must lay a foundation before the recording is admitted.

23. to Exclude Plaintiffs’ Expert Witness Scott DeFoe from Offering Any Opinions Except Those Included in His Expert Report and that He Testified to at His Deposition (Doc. 178, Defendants’ MIL No. 23).

Defendants seek to preclude Plaintiffs’ witness, Scott DeFoe, from testifying outside the scope of his expert report or deposition, under Rule 26(a), as to five specific opinions. Plaintiffs concede that of the five expert opinions in contention, four are irrelevant to this case in its current status. *See* Doc. 201 at 3:12-14. Therefore, as to the four opinions specified by the parties, the Court **GRANTS** the motion and these four opinions are excluded on relevance grounds.

Thus, the only issue remaining before the Court in the instant motion is whether DeFoe’s fifth opinion—that “It is doubtful that the hobble was necessary during the incident” —should be precluded. Based on the representations of counsel it appears that, with the reasonable drawing of inferences, DeFoe included this fifth opinion at proper times in proper designations. This issue will

1 be left to counsel for impeachment during trial, and ultimately for the jury to make a factual
2 determination. As to this fifth opinion by DeFoe, the Court **DENIES** the motion.

3 **III. CONCLUSION AND ORDER**

4 For the foregoing reasons, **IT IS HEREBY ORDERED** that the parties' motions *in limine*
5 are **GRANTED IN PART** and **DENIED IN PART**, as set forth above.

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8 IT IS SO ORDERED.

9 Dated: **April 14, 2016**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE